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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. KEVIN AINSWORTH, Defendant and Appellant.	B220460 (Los Angeles County Super. Ct. No. BA297304)

APPEAL from a judgment of the Superior Court of Los Angeles County. William C. Ryan, Judge. The judgment of conviction is affirmed and the matter is remanded for sentencing.

Katharine Eileen Greenebaum, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Michael C. Keller and David Zarmi, Deputy Attorneys General, for Plaintiff and Respondent.

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Appellant Kevin Ainsworth was found guilty on one count of transportation of marijuana in violation of section 11360, subdivision (b) in a previous trial which ended in a hung jury on the remaining counts. Those remaining counts were retried and the jury convicted him of count 2, possession for sale of marijuana in violation of Health and Safety Code section 11359[1]; count 3, transportation of cocaine base in violation of section 11352, subdivision (a); count 4, possession of cocaine base in violation of section 11350, subdivision (a); count 5, possession for sale of marijuana in violation of section 11359; count 6, possession of a firearm by an ex-felon in violation of Penal Code section 12021, subdivision (a)(1); and count 7, possession for sale of phencyclidine (PCP) in violation of section 11378.5.

In the second trial, the jury found that as to all counts, appellant had suffered two prior serious or violent felony convictions within the meaning of Penal Code section 1170.12, subdivisions (a) through (d) and Penal Code section 667, subdivisions (b) through (i) (the "Three Strikes" law). The jury also found true that appellant had suffered three prior prison terms pursuant to Penal Code section 667.5, subdivision (b). The jury found true that as to counts 4 and 7, appellant had suffered five prior drug convictions pursuant to section 11370.2, subdivision (a) and that as to count 7, appellant was personally armed. (Pen. Code, § 12022, subd. (c).)

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1 All further statutory references are to the Health and Safety Code unless otherwise indicated.

In the second trial, the court sentenced appellant to 35 years in prison.[2] Appellant appealed from the judgment and we remanded the matter for the trial court to correct or clarify a number of sentencing issues.[3]

On remand, the trial court resentenced appellant as follows: the court selected count 7 as the base term and imposed sentence of one-third of the midterm of four years, doubled as a second strike to eight years, plus four years for the personally armed allegation, a total of 12 years; consecutive terms of one-third of the midterm, or eight months, doubled as a second strike to 16 months for each of counts 2, 4, 5 and 6, ordering

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2 The trial court imposed the sentence as follows: consecutive sentences on the principle term of 12 years on count 7 as the base term (including four years for the personally armed allegation); consecutive sentences of one-third of the midterm or eight months, doubled as a second strike to 16 months for each of counts 2, 4, 5, and 6 (a total of five years, four months); a consecutive sentence of one-third the midterm, or 16 months, doubled as a second strike to 32 months on count 3; and four years on the Penal Code section 12022, subdivision (c) enhancement and three years each on five section 11370.2, subdivision (a) enhancements (a total of 19 years). The trial court stayed the three Penal Code section 667.5, subdivision (b) enhancements and the Penal Code section 12022, subdivision (c) enhancement.

3 We take judicial notice of the record and our opinion *People v. Ainsworth* (April 28, 2009, B200410 [nonpub. opn.]) referred to by both parties in the instant appeal. (Cal. Rules of Court, rule 8.115; Evid. Code, §§ 452, 459.)

Specifically, we ordered the trial court to determine whether to sentence consecutively or concurrently under the Three Strikes law as to counts 2, 3, and 4, and to determine whether to sentence consecutively or concurrently under the Three Strikes law as to counts 5, 6, and 7; select the term for at least one of the offenses committed in counts 2, 3, or 4, and impose it consecutively to the term imposed on count 7; clarify or correct the term selected as the midterm for count 7 and clarify or correct the number of enhancements pursuant to section 11370.2; determine whether Penal Code section 654 applies to any of the terms where consecutive sentences are not mandated by the Three Strikes law; modify the judgment to indicate that appellant served only two prior prison terms under Penal Code section 667.5, subdivision (b); impose the one-year terms for the two Penal Code section 667.5, subdivision (b) enhancements or strike them; and modify the judgment to reflect a total of 1,051 days of presentence custody credit. (*People v. Ainsworth* (April 28, 2009, B200410 [nonpub. opn.].)

the sentence on count 4 stayed; consecutive terms of one-third of the midterm, or 16 months, doubled as a second strike to 32 months as to count 3; consecutive terms of enhancements totaling 15 years for the five prior narcotics convictions; and one year each for the prior prison terms and serious felony enhancements. The enhancement pursuant to Penal Code section 667.5(b) was ordered stayed. The trial court ordered appellant to pay a laboratory fee of $50 for each narcotics count, or $250 (§ 11372.5); a $20 court security fee for each count, or $120 (Pen. Code, § 1465.8); a criminal conviction assessment of $30 for each count (Gov. Code, § 70373); a $3,500 restitution fine (Pen. Code, § 1202.4, subd. (b)); and a $3,500 parole revocation fine (Pen. Code, § 1202.45) that was stayed.

We affirm the judgment and remand the matter for sentencing.

CONTENTIONS

Appellant contends that: (1) the trial court committed prejudicial error when it did not stay sentencing on one of the marijuana convictions and one of the cocaine convictions pursuant to Penal Code section 654; and (2) the trial court should have stricken, not stayed those prior prison terms. The People contend that the judgment should be modified to include additional mandatory fees.

FACTUAL BACKGROUND[4]

Appellant's arrest

On July 15, 2005, at 5:00 a.m., undercover Los Angeles Police Officer Shawn Hetherington noticed appellant conducting several hand-to-hand exchanges with a man in a gas station parking lot. Officer Hetherington, a narcotics expert, believed that appellant was selling drugs, and the other man was working as an intermediary. He broadcast a description of appellant and his activities over the radio.

Other officers detained appellant on a traffic stop as he drove back and forth to the Hollywood Stars Inn about three blocks away from the gas station. The officers smelled

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4 The factual background is taken from *People v. Ainsworth* (April 28, 2009, B200410 [nonpub. opn.].)

marijuana coming from the car. Appellant gave the officers a driver's license with his photo and a false name, Marcus Dion Best. He subsequently admitted his true name to the officers. He appeared to be under the influence of marijuana. A search of the car revealed a clear plastic baggie containing rock cocaine; two small plastic baggies containing marijuana; three cell phones; and two scales in the glove compartment, one of which contained an off-white powdery residue consistent with rock or powder cocaine. Officers also found a key for room No. 206 at the Hollywood Stars Inn.

Officer Hetherington spoke to the manager of the Hollywood Stars Inn who gave him a room registration card and invoice showing that room No. 206 was registered to Marcus Dion Best. The manager also gave Officer Hetherington a master key to room No. 206. Both the master key and the key the officers found on appellant opened the door to room No. 206. Officer Hetherington and other officers searched the room and found a large bag containing marijuana underneath the box spring of the bed. A .38-caliber revolver loaded with five live rounds fell out of the box spring. Officers also discovered a safe disguised as a power outlet; a cell phone in a nightstand; and $1,450 in cash between the mattress and box spring. Four hundred dollars of the cash was later found to be counterfeit. Officers also found a pot and lid; a one-pound box of baking soda; and a hot plate near the refrigerator. Officers discovered 11 glass vials which contained PCP inside a pizza box in the refrigerator. On top of the bed, the officers found a duffel bag containing three live rounds of the same model, make and caliber as the loaded rounds in the revolver; 268 plastic baggies in three different sizes; eight small vials; and mail addressed to appellant. Officers found a small baggie of marijuana in appellant's right shoe when he was searched at the police station.

One forensic print specialist found inconclusive results, but three other forensic print specialists testified that appellant's prints were on the gun. The parties stipulated to the amounts of narcotics contained in the People's exhibits as: .47 grams of cocaine, .97 grams of marijuana, 425.84 grams of marijuana, and 2.4 grams of PCP. The parties also stipulated that prior to July 15, 2005, appellant was a convicted felon.

DISCUSSION

I. The trial court properly sentenced appellant on his marijuana convictions

Appellant contends that one of the sentences for possession for sale of marijuana, count 2, or count 5, should have been stayed pursuant to Penal Code section 654, because he harbored the same intent and objective, that is, to sell marijuana, despite the fact that the marijuana was found in two different locations, the motel room and the car. Using the same reasoning, he argues that the sentence on count 4, possession for sale of cocaine found in the motel room or the sentence on count 3, transportation for sale of cocaine found in the car should have been stayed pursuant to Penal Code section 654. We find no merit to the first contention and need not address the second contention because the trial court stayed sentence on count 4.

Penal Code section 654 provides that: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision."

"Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one." (*Neal v. State of California* (1960) 55 Cal.2d 11, 19.) The protection of section 654 has been extended to cases where a single act or omission has occurred, or where there are several offenses committed during a course of conduct deemed to be indivisible in time. (*People v. Le* (2006) 136 Cal.App.4th 925, 931–932.) "It is defendant's intent and objective, not the temporal proximity of his offenses, which determine whether the transaction is indivisible. [Citations.]" (*People v. Harrison* (1989) 48 Cal.3d 321, 335.) The trial court's factual findings regarding the defendant's intent and objective will be upheld if supported by substantial evidence, and we review the trial court's determination as to intent in a light most favorable to the judgment. (*People v. Andra* (2007) 156 Cal.App.4th 638, 640–641.)

Appellant cites *People v. Avalos* (1996) 47 Cal.App.4th 1569, 1583 (*Avalos*) in support of his argument that Penal Code section 654 bars multiple sentencing for count 2, possession of marijuana for sale found in the car and count 5, possession of marijuana for sale found in the motel. *Avalos*, however, is distinguishable from the instant case. In *Avalos, supra,* at page 1574, the defendant was detained by police after they observed him arrive at an apartment, enter it, leave carrying a box, drive to a commercial storage business, pick up a smaller box and place it in his truck. During a consensual search of the defendant's truck, the police recovered five pounds of methamphetamine. Pursuant to a search warrant, officers later recovered additional methamphetamine and drug-related paraphernalia from the apartment and storage unit. The defendant pled guilty to one count of transportation of methamphetamine and three counts of possession for sale of methamphetamine, among other things. In *Avalos*, the Court of Appeal simply accepted the Attorney General's concession that "the trial court erred by not staying defendant's sentences on counts one, two and three which concerned transportation of methamphetamine and possession of methamphetamine for sale." (*Id*. at p.1583.) The court did not discuss or analyze the facts or the law in determining that the sentences should be stayed. Here, on the other hand and as discussed *post*, the storage of the marijuana in the motel room and on appellant's person was such that the jurors could infer that appellant was a sophisticated dealer who intended to sell drugs to multiple parties.

People v. Fusaro (1971) 18 Cal.App.3d 877, disapproved on other grounds in *People v. Brigham* (1979) 25 Cal.3d 283, 292, footnote 15, is instructive. In that case, the court held that the sales of amphetamine on two different days constituted two separate criminal acts and not an indivisible course of criminal conduct aimed at a single objective because each act had its own objective of a sale to a different individual. (*People v. Fusaro, supra,* at pp. 893–894.) The Court of Appeal also noted that "separate punishments for sale and possession may not be imposed where the sale consists of the peddler's entire inventory. Where, as here, each sale consumes only part of his inventory, he may be punished separately for the possession of his unsold stock in trade."

(*Id*. at p. 894.) That is, "if a person sells only part of the narcotics he possesses, both the offenses of possession and sale may be punished, since possession of the excess unsold narcotics was not necessary to the sale." (*In re Adams* (1975) 14 Cal.3d 629, 633, 636.)

People v. Blake (1998) 68 Cal.App.4th 509 also provides guidance. In that case, a search of the defendant's car revealed a jar of methamphetamine and a pipe of marijuana. The Court of Appeal held that the trial court did not violate Penal Code section 654 when it imposed separate sentences for transporting marijuana and transporting methamphetamine. (*People v. Blake, supra,* at p. 512.) The court found that "the record supports an inference that defendant intended multiple sales to different customers: (1) the marijuana and methamphetamine were stored in separate containers in different concealed compartments of the car; (2) the marijuana was packaged in a manner consistent with multiple, individual sales; (3) the amounts of marijuana and methamphetamine were consistent with delivery to more than one individual; (4) the difference between the drugs suggests they were 'directed at different buyers' [citation]; and (5) the presence of a 'pay-owe' sheet with multiple entries, a police scanner, baby wipes, and a scale indicates defendant was engaged in an elaborate drug trafficking operation involving multiple sales to different individuals, rather than one single delivery." (*Ibid*.)

Here, the evidence tended to show that appellant had separate objectives for the marijuana found in the car and the marijuana found in the motel room. The record supports the inference that appellant intended multiple sales to different customers. After observing what appeared to be several hand to hand exchanges with a man in a gas station parking lot, officers detained appellant as he drove back and forth from the Hollywood Stars Inn. Officers recovered prepackaged baggies of marijuana from inside appellant's car and a separate baggie of marijuana in his shoe. In the motel room, officers recovered a large bag of marijuana. Moreover, the officers also recovered three cell phones and two scales from the car. From the motel room, the officers recovered another cell phone, a revolver, cash, a hot plate, pot, lid and baking soda, glass vials, and 268 plastic baggies. The amount of illicit drugs and drug paraphernalia indicated that

appellant was a sophisticated drug dealer involved in selling drugs to multiple individuals. The large amount of marijuana in the motel room supported an inference that appellant had engaged in sales of only part of the narcotics he possessed.

We conclude that the trial court did not err in refusing to stay the sentence imposed on either count 2 or count 5 pursuant to Penal Code section 654.

II. The trial court must impose or strike the Penal Code section 667.5, subdivision (b) enhancement

Appellant contends that the trial court should have stricken one of his prior prison terms pursuant to Penal Code section 667.5 on remand. It is the People's position that the trial court should have either imposed the second prior prison sentence enhancement or stricken it.

Penal Code section 667.5, subdivision (b) provides: "Enhancement of prison terms for new offenses because of prior prison terms shall be imposed as follows: [¶] . . . [¶] (b) . . . where the new offense is any felony for which a prison sentence is imposed, in addition and consecutive to any other prison terms therefor, the court shall impose a one-year term for each prior separate prison term served for any felony; provided that no additional term shall be imposed under this subdivision for any prison term served prior to a period of five years in which the defendant remained free of both prison custody and the commission of an offense which results in a felony conviction."

On remand, we directed the trial court to "impose the one-year terms for the two Penal Code section 667.5, subdivision (b) enhancements or strike them." (*People v. Ainsworth* (April 28, 2009, B200410 [nonpub. opn.].) At the resentencing hearing, the trial court stayed one of appellant's prior prison terms pursuant to Penal Code section 667.5, "in the interest of fairness" so as not to increase appellant's sentence beyond the 35 years to which he was originally sentenced. But the trial court should have either imposed the one-year term for the remaining Penal Code section 667.5, subdivision (b) enhancements or stricken it. (*People v. Langston* (2004) 33 Cal.4th 1237, 1241 [the one-year term for Penal Code section 667.5 subdivision (b) enhancements are mandatory unless stricken and the trial court may not impose and stay the terms].)

Accordingly, the trial court is directed to apply or strike appellant's second prior prison term enhancement.

III. The judgment must be modified to include the additional mandatory fees

The People contend the trial court failed to impose a state penalty assessment of $50 on each of the five laboratory fees (§ 11372.5, subd. (a); Pen. Code, §1464, subd. (a)) and a county penalty assessment of $35 on each of the five laboratory fees (Gov. Code, § 76000, subd. (a)), for a total of $425. (*People v. Taylor* (2004) 118 Cal.App.4th 454, 456.) The People also contend that the trial court failed to impose a state surcharge of 20 percent of each laboratory fee, or $10 per fee, for an additional $50 (Pen. Code, § 1465.7, subd. (a); *People v. McCoy* (2007) 156 Cal.App.4th 1246, 1257), and a state court construction penalty of $15, for an additional $75 (Gov. Code, § 70372, subd. (a)). The People also contend that the abstract of judgment must be modified to reflect a laboratory fee of $50 for each of five counts, rather than six counts, and to reflect a $180 criminal conviction assessment imposed by the trial court. (Gov. Code, § 70373.)

Appellant concedes that these mandatory penalties and assessments should have been imposed but urges that they should be stayed as to the counts on which punishment must be stayed pursuant to Penal Code section 654. Because we have not stayed punishment on any counts pursuant to Penal Code section 654, we shall order imposition of all mandatory penalties and assessments.

DISPOSITION

The matter is remanded to the trial court to impose or strike appellant's second prior prison term enhancement. (Pen. Code, § 667.5, subd. (b).) The judgment is modified to reflect the following: a state penalty assessment of $50 on each of the five laboratory fees (§ 11372.5, subd. (a); Pen. Code, §1464, subd. (a)) and a county penalty assessment of $35 on each of the five laboratory fees (Gov. Code, § 76000, subd. (a)), for a total of $425; a 20 percent state surcharge of $10, for an additional $50 (Pen. Code, § 1465. 7); and a state construction penalty of $15 for an additional $75 (Gov. Code, § 70372, subd. (a)). The trial court is directed to correct the abstract of judgment to reflect the modifications to the judgment and to reflect a laboratory fee of $50 for each of five counts, rather than six counts, and a $180 criminal conviction assessment imposed by the trial court and to send a corrected copy of the abstract of judgment to Department of Corrections and Rehabilitation. (Gov. Code, § 70373.)

In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.

DOI TODD

We concur:

_____, P. J.

BOREN

_____, J.

ASHMANN-GERST